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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 94-78
Table of Allotments,)	RM-8472
FM Broadcast Stations.)	RM-8525
(Cloverdale, Montgomery)	
and Warrior Alabama))	
)	

TO: Chief, Allocations Branch

OPPOSITION TO "MOTION FOR A WAIVER OF AUTOMATIC STAY"

William P. Rogers ("Rogers"), by his attorney, hereby respectfully opposes the Motion for a Waiver of Automatic Stay, filed in this proceeding by North Jefferson Broadcasting Company, Inc., and Deep South Broadcasting Company, on February 15, 1996. In opposition thereto, it is alleged:

1. Commission policy has, for many years, favored the establishment of new broadcast service over the expansion of existing service. In this proceeding, however, the FCC denied a proposal by Rogers to establish a new broadcast allotment at Florence, Alabama, and decided, instead to approve an upgrade in the facilities of a couple of existing stations. The Commission gave three reasons for denying the Rogers proposal: the proposal was allegedly short spaced to the licensed site of Station WZLQ(FM), Tupelo, Mississippi; the allotment would not provide a

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city grade signal to the entire Florence community; and in computing coverage of the community, Rogers' engineer used terrain enhancement to demonstrate coverage of more than 80% of the city.

2. In a Petition for Reconsideration, filed in this proceeding on January 11, 1996, Rogers showed that the allotment is not short spaced, because the Tupelo, Mississippi, station still has a valid construction permit for new facilities at a site that is not short spaced and, while the permit may have technically expired, the actual facilities have been substantially constructed. In an Opposition to Petition for Reconsideration, filed in this proceeding on February 15, 1996, WLBI and WBAM concede, in substance, that the WZLQ construction permit remains viable and that the licensee of the station, San-Dow, has filed an application to replace its expired permit. See, Opposition to Petition for Reconsideration, footnote 3. Thus, the first reason given by the Chief, Allocations Branch, for denying Rogers' proposal is clearly not valid.

3. The other two reasons given for denying Rogers' proposal are, of course, related, since they both pertain to coverage of the community. However, as shown in Rogers' Petition for Reconsideration, the Commission has made many allotments, knowing full well that there was no site from which any applicant could achieve even the normally sufficient 80% coverage of that city. Here, as Rogers' engineer showed, there are, in fact, sites from which 80% or more of the city could be served. Accordingly, the city coverage issue is not a basis for denying Rogers' proposal

and it is very likely that, ultimately, the Commission will decide to grant that proposal.

4. In their Motion for a Waiver of Automatic Stay, WLBI and WBAM state that they are willing to share the risk of an adverse decision in this rule making proceeding and go ahead and construct their approved facilities subject to the outcome of this rule making proceeding. They urge the Allocations Branch to allow them to do just that.

5. The problem with the WLBI/WBAM proposal is simply that it flies in the face of sound public policy and numerous precedents. Many times the Court of Appeals has cautioned the Commission not to allow applicants to proceed with construction where it might prejudice the Commission's ultimate determination in a proceeding.

6. In Community Broadcasting Co., Inc., v. FCC, 274 F.2d 753 (DC Cir. 1960), the FCC sought to grant a special temporary authority to one of several comparative applicants for a television station. In a decision written by Warren Burger, the Court set aside the STA, saying that while the FCC had the authority to issue STA's, such a procedure is an extraordinary one, and jeopardizes the "whole scheme of comparative consideration". See also, Consolidated Nine, Inc. v. FCC, 403 F.2d 585 (D.C. Cir., 1968).

7. The same Court also prohibited the CAB from naming a "temporary operator", where there were several applicants to operate a particular airline route. In one case to that effect, the Court remarked that, "The issues raised in these proceedings

are usually very complex and technical and it would be extremely difficult for us to determine, after the fact, whether the triers of fact had unconsciously favored the 'temporary' operator because of his interim operations. Moreover, even if we were able to conclude that the decision regarding permanent authority had been subtly influenced, it would be virtually impossible for us to remedy the situation, for the actions giving rise to the situation had been completed". Kodiak Airways, Inc., v. CAB, 447 F.2d 341 (D.C. Cir., 1971), at page 345. See also Springfield Airport Authority v. CAB, 285 F.2d 277 (1960).

8. In La Star Cellular Telephone v. FCC, 899 F.2d 1233 (1990), the Court did, in fact, allow one of two comparative applicants for a cellular telephone license to operate the system under an STA. In doing so, however, the Court distinguished Community Broadcasting and Consolidated Nine because, through an error, the FCC had already allowed the interim operator to make the investment in the system, so that by granting the STA the FCC was not encouraging the investment which might later influence its judgment.

9. Here, WLBI and WBAM have not yet invested in their upgrade. To allow them to make such an investment could subtlety influence the judgment of this agency when the time comes to decide whether to approve the Florence allotment or the mutually exclusive WLBI/WBAM upgrades. Therefore, a grant of the waiver request by WLBI/WBAM is contrary to both good public policy and to well established judicial precedent.

WHEREFORE, it is respectfully requested that the Motion for a Waiver of Automatic Stay, filed in this proceeding on February 15, 1996, be denied.

February 22, 1996

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Respectfully submitted,

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By: 

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His Attorney

CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 22nd day of February, 1996, to the offices of the following:

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